ORAL ARGUMENT SCHEDULED FOR DECEMBER 11, 2018

Consolidated Case Nos. 18-1063 & 18-1078

IN THE

United States Court of Appeals for the District of Columbia Circuit

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC,

Intervenor for Respondent.

On Petition for Review of a Decision and Order of the National Labor Relations Board and Cross-Application for Enforcement

FINAL REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT

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GLOSSARY

Duquesne or the University:	Duquesne University of the Holy Spirit
NLRA or the Act:	National Labor Relations Act
NLRB or the Board:	National Labor Relations Board
RFRA:	Religious Freedom Restoration Act
the Union:	United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC

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INTRODUCTION AND SUMMARY OF ARGUMENT

1. Under the established law of this Circuit, Duquesne University is "patently beyond" the Board's jurisdiction. *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 574 (D.C. Cir. 2009) (applying *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002)). The Board disingenuously claims that its assertion of

jurisdiction in this case is "consistent" with *Great* Falls, NLRB Br. 17; that the standard it adopted in *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014), "adopts and applies" *Great Falls*, NLRB Br. 23; and that *Pacific Lutheran* "did not outright reject" *Great Falls*, NLRB Br. 24-25. The Union makes the same misleading assertion, claiming that *Pacific Lutheran* "faithfully follows this Court's direction in *Great Falls*." Union Br. 28. Nothing could be further from the truth. In fact, the Board in *Pacific Lutheran* explicitly rejected *Great Falls*, explaining that the *Great Falls* test "overreaches" because it allegedly "goes too far in subordinating Section 7 rights and ignores federal labor policy as embodied by the Act." 361 N.L.R.B. at 1409.

What the Board and Union are really contending is that *Great Falls* and *Carroll College*, as well as then-Judge Breyer's controlling opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir.1986) (en banc), upon which they both relied, are wrong—that this Court and Judge Breyer have misread *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and improperly applied it to religiously-affiliated colleges and universities. But this Court has already rejected the contention that it should defer to the Board's interpretation of *Catholic Bishop*, *see Great Falls*, 278 F.3d at 1341, and the Board's attempt to adopt another new interpretation of *Catholic Bishop* provides no basis for this Court to disregard its settled precedents. The short of the matter is that there is no dispute that Duquesne

satisfies the three-part *Great Falls* test, and therefore, under settled Circuit law, Duquesne's adjunct faculty are "patently beyond" the Board's jurisdiction.

2. Even if the question in this case were whether *Pacific Lutheran* is consistent with *Catholic Bishop* and this Court's precedents, the answer is no. *Pacific Lutheran* disregards the constitutional avoidance rationale of *Catholic Bishop*: that in order to avoid the ongoing entanglement with religion that Board jurisdiction over the faculty of religious-affiliated institutions would inevitably create, the National Labor Relations Act (NLRA) must be interpreted not to confer such jurisdiction absent an affirmative statement of Congress that it intends the Act to reach so far. The Board's approach, in contrast, explicitly represents a bold attempt to extend its jurisdiction to and beyond the constitutional limit. The Board defends its approach as an "accommodat[ion]" of Section 7 rights and the protections of the First Amendment, NLRB Br. 16, but *Catholic Bishop* prohibits this balancing of interests.

The Board and Union repeatedly assure this Court that *Pacific Lutheran* is a limited inquiry into a university's public representations about its faculty that is fully consistent with *Catholic Bishop* and *Great Falls*. But the "specific religious function" test, as interpreted by the Board in *Pacific Lutheran* and in its brief to this Court, takes an impermissibly crabbed view of what constitutes a "religious function," one that *Great Falls* has already rejected. Faculty at a religiously-

affiliated university such as Duquesne are not "wholly secular," NLRB Br. 26, simply because they do not perform overtly religious duties, or because the university affords them academic freedom.

The Board's and Union's assurances that *Pacific Lutheran* steers clear of First Amendment entanglement issues prove equally unconvincing. As explained in Duquesne's opening brief (at 34-47), *Pacific Lutheran* entangles the Board in a university's religious affairs in two ways: it requires the Board to question and engage in intrusive inquiries about the university's religious mission when determining whether to assert jurisdiction, and it promises continuing intrusions in unfair labor practice proceedings over the duty to bargain and adverse employment actions. To avoid this result, the Board in its brief makes a number of concessions, including that it might revisit its jurisdictional determination and grant Duquesne a *Catholic Bishop* exemption if the University modifies its public documents in some unspecified way. NLRB Br. 38. But the Board's representations only serve to confirm that the risk of entanglement is real, and the concessions are so ambiguous that they will lead only to further intrusion and more litigation for religiously-affiliated universities such as Duquesne.

3. The Board's application of *Pacific Lutheran* in this case is also unpersuasive and demonstrates that the Board's assertion that it will look solely to how the University presents itself to the public is fictitious. The University's

public statements show that all of Duquesne's faculty, including adjuncts, are expected to support the University's religious mission. The Board's insistence that these statements are too general or not sufficiently publicized is baseless. Indeed, the Board is unable to distinguish another recent case in which the Board held that it did not have jurisdiction over Carroll College on substantially identical facts.

4. Finally, the Board's assertion that Duquesne's RFRA argument is barred by its "non-relitigation" rule should be rejected. Duquesne timely raised the RFRA issue before the Board, and in any event, a RFRA claim is not a "representation" issue that must be presented to the Board at the representation stage.

ARGUMENT

I. THE BOARD AND UNION DISREGARD THE BINDING LAW OF THE CIRCUIT.

Under the law of this Circuit, *Catholic Bishop* precludes the Board's exercise of jurisdiction over the faculty of a religiously-affiliated university when the three-part *Great Falls* test is satisfied. *Great Falls*, 278 F.3d at 1339-47. Duquesne clearly satisfies this test, and neither the Board nor the Union contends otherwise.

Instead, the Board and Union attempt to reframe the question as whether *Pacific Lutheran* is a reasonable interpretation of *Catholic Bishop*. *See, e.g.*, NLRB Br. 2-3, 5, 15; Union Br. 5-6. However, this Court has already held that it owes no deference to the Board's interpretation of *Catholic Bishop*. As the Court

explained in *Great Falls*, there is "no reason for courts . . . to defer to agency interpretations of the Court's opinions." 278 F.3d at 1341 (internal quotation marks omitted). And the Court has already interpreted *Catholic Bishop* to mean that when *Great Falls*' three-part test is satisfied, a faculty bargaining unit is "patently beyond" the Board's jurisdiction. *Carroll Coll.*, 558 F.3d at 574. Thus, the mere fact that the Board has adopted a new interpretation of *Catholic Bishop* cannot alter this Court's well-reasoned and controlling interpretation of the Supreme Court's decision.

The Board and Union make a variety of arguments in an effort to avoid this conclusion, but none is persuasive. For example, the Board suggests that the *Great Falls* test is not binding because the Court "never fully endorsed" the third prong of the test. NLRB Br. 25; *see id*. at 21. That is plainly wrong. The Court in *Great Falls* clearly articulated its test, adopted it and relied upon it as the basis for its decision. 278 F.3d at 1343-45; *see also id*. at 1347 (summarizing Court's holding). And in *Carroll College*, the Court explicitly applied the three-part test as the basis for the Court's decision. 558 F.3d at 574. Since there is no question that Duquesne satisfies the third prong, because it is affiliated with a recognized religious organization, the fact that the *Great Falls* Court held open that other circumstances might substitute for that requirement is irrelevant here.

Similarly, the Union is wrong to suggest that this Court never considered the

role of the faculty in developing the *Great Falls* test. Union Br. 29. The Union overlooks that a key part of the "substantial religious character" test rejected by the *Great Falls* Court included the role of the unit employees in effectuating the religious purpose of the university, including whether "religious criteria are used for the appointment and evaluation of faculty." *Great Falls*, 278 F.3d at 1339. The Union also overlooks that *Great Falls* expressly addressed the role of faculty at the university and rejected the argument that academic freedom eliminates the potential for entanglement. *See id.* at 1345-46.

The Union argues that *Great Falls* did not hold that all religiously-affiliated higher education institutions are exempt from Board jurisdiction, regardless of how much or how little religion permeates their secular education. Union Br. 29-30 (citing *Tilton v. Richardson*, 403 U.S. 672, 680 (1972)). The Union is mistaken. This Court's holding in *Great Falls* was not based on any finding that the university was pervasively sectarian, as the Union's brief seems to suggest, or that the risk *Catholic Bishop* seeks to avoid applies only to pervasively sectarian institutions. Just the opposite. Looking to then-Judge Breyer's opinion in *Bayamon*, the Court quoted approvingly his view that "the analysis in *Catholic Bishop* applies equally well, not only to institutions that are 'pervasively sectarian,' but also to a 'college that seeks primarily to provide its students with a secular education, but which also maintains a subsidiary religious mission.'" *Great Falls*,

278 F.3d at 1342 (quoting *Bayamon*, 793 F.2d at 398–99).[1]

The Board and Union also argue that *Pacific Lutheran* is consistent with *Great Falls* because the Board's decision merely extends *Great Falls'* "holding out" analysis—which asks how a university holds itself out to the public—to how the university "holds out" its faculty to the public. NLRB Br. 18-19; Union Br. 5-6. But *Pacific Lutheran* is not just an extension of *Great Falls*; it is a radical departure that cannot be adopted without overruling *Great Falls*. This is so due to the fundamental difference between the two "holding out" inquiries. *Great Falls* simply asks whether the institution "holds itself out as providing a religious educational environment, even if its principal academic focus is on 'secular' subjects," in order to ensure that the exemption from Board jurisdiction is not given to "wholly secular institutions." 278 F.3d at 1344. The *Great Falls* test does not inquire into the centrality or importance of the religious mission, *id*., and does not include any inquiry into how specific the religious mission may be or attempt to compare the institution's description of its educational environment to secular

[1] The Union also relies on the Second Circuit's decision in *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980), to suggest that exemption from NLRB jurisdiction depends upon the faculty's commitment to religious values and obligation to teach them to students. Union Br. 38-39. Not so. *Bishop Ford* expressly disclaimed that it was deciding whether *Catholic Bishop* applied only to such pervasively sectarian schools: "While there may be an issue in some cases as to how much religious orientation is required to characterize a school as religious, that is not the dispute here." 623 F.2d at 823.

schools. The result is an easy-to-apply, bright-line test, with minimal risk for unconstitutional entanglement.

In contrast, *Pacific Lutheran* adds a new requirement, asking whether the university presents its faculty as performing a sufficiently "specific religious function." 361 N.L.R.B. at 1411. This is a much more intrusive inquiry, and creates all the entanglement problems that *Great Falls* sought to avoid. That is because it requires *the Board* to determine what is and is not a specific religious function, and whether the university's religious mission and expectations have been stated clearly enough for the Board's satisfaction. The Board's approach is nothing like the simple bright-line rule established by *Great Falls* and reaffirmed in *Carroll College*.

Finally, the Board's and Union's arguments about *Great Falls* also ignore the fact that in *Carroll College*, the college failed to raise the *Catholic Bishop* exemption before the Board at all. *Carroll Coll.*, 558 F.3d at 574. Nevertheless, this Court held that "[a]fter our decision in *Great Falls*, Carroll is patently beyond the NLRB's jurisdiction." *Id.* The Court admonished the Board that "[f]rom the Board's own review of Carroll's publicly available documents," the Board "should have known immediately that the college was entitled to a *Catholic Bishop* exemption from the NLRA's collective bargaining requirements." *Id.* If it did not matter in *Carroll College* that the college had failed to raise the exemption and the

Board failed to consider it, it cannot matter here that the Board considered the exemption under a new test—either way, under the law of this Circuit and the undisputed facts, Duquesne is "patently beyond" the Board's jurisdiction. *See* Duquesne Br. 28-30.

II. *PACIFIC LUTHERAN* CANNOT BE SQUARED WITH *CATHOLIC BISHOP* OR ITS PROGENY.

Even if the three-part *Great Falls* test did not decide this case, the Board's ruling under *Pacific Lutheran* cannot stand. *Pacific Lutheran* misreads *Catholic Bishop*, ignores its constitutional avoidance rationale, and perpetuates the significant risk of entanglement that *Catholic Bishop* sought to avoid. Nothing in the Board's or Union's arguments to the Court overcomes these defects.

A. The Board Disregards *Catholic Bishop's* Constitutional Avoidance Rationale.

Catholic Bishop was based on the principle of constitutional avoidance. To avoid the ongoing risk of entanglement with religion that Board jurisdiction over the faculty of religiously-affiliated institutions inevitably creates, the Supreme Court held that the NLRA cannot be construed to apply absent an affirmative statement of Congress. 440 U.S. at 501, 504-06. The Court found no such affirmative statement then, nor has there been any such statement from Congress since.

The Board defends *Pacific Lutheran* as an effort to exercise "the fullest

jurisdictional breadth constitutionally permissible under the Commerce Clause." NLRB Br. 23 (quoting *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 313 (1963) (per curiam)). But the Supreme Court had that very argument before it in *Catholic Bishop* and rejected it. *See* 440 U.S. at 516 (Brennan, J., dissenting) (invoking *Reliance Fuel*). Nor is it open to the Board to attempt to "accommodate" the interests protected by the NLRA and the First Amendment Religion Clauses, NLRB Br. 16, because *Catholic Bishop* already struck that balance. *See Pacific Lutheran*, 361 N.L.R.B. at 1432 (Johnson, Member, dissenting) (calling the majority's effort to balance Section 7 and First Amendment rights "stark error . . . because no federal statute commands the gravitas of the Constitution").

B. The Board's Parsimonious Definition of "Specific Religious Function" is Irreconcilable with the Teachings of *Catholic Bishop* and *Great Falls*.

Nothing in *Catholic Bishop* or *Great Falls* permits the Board to assert jurisdiction over pockets of faculty at religiously-affiliated schools by deciding which faculty members perform a "specific religious function," as *Pacific Lutheran* requires. As explained in Duquesne's opening brief (at 34-47), the Board's new test is unconstitutionally intrusive and creates all the entanglement problems that *Catholic Bishop* and *Great Falls* sought to avoid. The Board's and Union's efforts to prove otherwise fall short. Indeed, the Board's refusal to take at face value the University's public statements about the religious role served by all

its faculty gives the lie to the Board's insistence that it is only looking at how the University holds itself out, and makes clear that a much more subjective judgment about how "religious" the University and the faculty are, in the Board's view, is at work.

First, the Board insists that the *Pacific Lutheran* test does not restrict the *Catholic Bishop* exemption to universities that "engage in hard-nosed proselytizing or promote [their] religious beliefs with an iron fist." NLRB Br. 32. *See Great Falls*, 278 F.3d at 1346 ("To limit the *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing . . . is an unnecessarily stunted view of the law"). *Pacific Lutheran* itself, however, indicates that faculty perform a "specific religious function" only when they have overtly religious responsibilities, such as being "required to . . . integrat[e] the institution's religious teachings into coursework, serv[e] as religious advisors to students, propagat[e] religious tenets, or engag[e] in religious indoctrination or religious training." 361 N.L.R.B. at 1412 & n.11. The Board argues that *Pacific Lutheran* offered that list only by way of example. NLRB Br. 30 n.6. But the Board's brief confirms that overtly religious responsibilities are exactly what *Pacific Lutheran* demands. In defense of the Board's application of *Pacific Lutheran* to this case, the Board argues that adjuncts at Duquesne do not perform a "specific religious function" precisely because they are not "expected to serve as religious advisors to students, engage in religious

training, educate students about religion, or conform to tenets of Catholicism in the course of their teaching duties." NLRB Br. 45. In other words, the "examples" are in fact the test.

Second, the Board and Union contend that Duquesne's commitment to academic freedom demonstrates that its faculty (other than in the Theology Department) serve a "wholly secular" role that justifies the Board's assertion of jurisdiction. *E.g.*, NLRB Br. 27; Union Br. 33. The Board maintains that "pledging commitment to diversity and academic freedom puts forth the message that religion has no bearing on faculty members' job duties or responsibilities." NLRB Br. 31; *see also* Union Br. 33. But *Great Falls* considered and rejected that same reasoning. As the Court explained, just because a "University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty." 278 F.3d at 1346. The Court held that the Board's approach was "an unnecessarily stunted view of the law," and perhaps a violation of the Establishment Clause, by preferring one approach towards spreading a religious message to students over another. *Id.*

The Board counters that "by extolling academic freedom, a university is requiring 'members to comply with norms shared by both a religion and wider society,' and is calling on faculty to fill a role that they 'would be expected to fill at virtually all universities.'" NLRB Br. 31 (quoting *Pacific Lutheran*, 361

N.L.R.B. at 411-12). But *Great Falls* rejected that argument, too. As this Court explained: "That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious." 278 F.3d at 1346.

For its part, the Union argues that Duquesne has adopted the American Association of University Professors' (AAUP's) 1940 Statement of Principles of Academic Freedom and Tenure ("1940 Statement"), *see* Union Br. 20-21, which, in its view, should deprive Duquesne of the *Catholic Bishop* exemption. But the Union ignores that the *Great Falls* Court applied the *Catholic Bishop* exemption to the university in that case notwithstanding that the university included the 1940 Statement in its faculty handbook. *See* Reply Br. for Petitioner at 4, *Great Falls*, 278 F.3d 1335 (No. 00-1415), 2001 WL 36037994.

Moreover, the Union is dead wrong in claiming that Duquesne has adopted the 1940 Statement to the same extent that a wholly secular institution would. On the contrary, Duquesne's *Faculty Handbook* expressly states that AAUP documents "are not binding on the University," except when "included in University policies and procedures." JA 770 [Union Ex. 9 at 12]. And although the University's statement of academic freedom includes portions of the 1940 Statement, it adds a limitation not found in the original: "The teacher should

respect the religious and ecumenical orientation of the University." *Id.*[2] The University's Executive Resolutions confirm that academic freedom is "subject to the principles and values expressed in the Duquesne University Mission Statement." JA742[Union Ex. 6, Executive Resolutions of the Board §V.B] (defining academic freedom in teaching). By their plain terms, the University's documents define a limit on academic freedom that is rooted in the University's religious mission.

The Board brushes that limit aside as too "general" under *Pacific Lutheran*. NLRB Br. 49. And the Union attempts to interpret away any religious limit on academic freedom by advancing its own view of what it means to "respect the religious and ecumenical orientation of the University." Union Br. 25. Attempting to paint Duquesne's approach as no different from that of any secular institution, the Union quotes a submission by the University to its accreditor stating that "the

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[2] *Compare* AAUP, 1940 Statement of Principles on Academic Freedom and Tenure, *available at* https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (last visited Oct. 16, 2018) ("Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.") (footnotes omitted), *with* JA770 [Union Ex. 9 at 12] ("Academic freedom is essential to teaching. The teacher is entitled to freedom in the classroom. The teacher should not, however, interject opinions which have no relation to the subject and should not impose personal views of the subject upon the students. *The teacher should respect the religious and ecumenical orientation of the University*.") (emphasis added).

University places a premium on intellectual autonomy and integrity and the pursuit of truth." *Id.* But the Union omits that later in that same submission the University also explains:

> It does not follow, however, that Duquesne's openness to dialogue will lead it to relinquish those core beliefs that constitute its specifically Catholic identity. *Hence, ecumenism does not mean that everything is acceptable*. In fact, while academic freedom is essential to teaching at Duquesne, the *Faculty Handbook* also states that . . . [t]he teacher should respect the religious and ecumenical orientation of the University . . . .
>
> The central conclusion with respect to academic freedom *is that academic autonomy is preserved within the context of Duquesne's mission statement*. . . . Newly appointed faculty are encouraged to conceptualize academic freedom *against the backdrop of a vibrant Catholic intellectual tradition and a critical dialogical exchange of ideas*.

JA 927-28 [Union Ex. 10 at 82–83] (emphases added); *accord* JA433 [Er. Ex. 6, Part 2, art. 4, § 4(a)–(b)] (*Ex Corde*, which is linked on the University's website and requires professors to demonstrate "respect for Catholic doctrine").

These public representations establish that adjunct faculty at Duquesne are not "indistinguishable" from those who teach at secular universities, as the Board claims. NLRB Br. 26. Duquesne considers all faculty, including adjuncts, to be vital to furthering the University's religious mission. Duquesne invites and encourages all faculty, including adjuncts, to engage with its religious mission, and academic freedom at Duquesne is subject to respect for that mission. And all

faculty, including adjuncts, understand that the University reserves the right to impose discipline, including termination or not being rehired, if a faculty member were to attack and undermine its religious mission. JA74 [Regional Director's Decision at 7]. The Union dismisses Duquesne's rule against faculty actions that express hostility to its religious mission, calling it merely "a typical employment rule against product disparagement." Union Br. 26. This assertion improperly demeans the University's religious mission.

At bottom, *Pacific Lutheran's* "specific religious function" test, like the Board's earlier "substantial religious character" test, improperly "minimize[s] the legitimacy of the beliefs expressed by a religious entity." *Great Falls*, 278 F.3d at 1345. The Board's ruling insists, based on its own conception of what counts as a "specific religious function," that none of Duquesne's faculty except those in the Theology Department "play a 'critical and unique role . . . in fulfilling'" the University's religious mission. NLRB Br. 51. The University strongly disagrees, and believes that all of its faculty serve its religious mission. A Duquesne adjunct is not just "any individual who stands in front of a classroom," as the Board disparagingly puts it. *Id.* at 27. Rather, in the University's view, the "essential role of the faculty in the educational mission of Duquesne is implicit in the stated goals and mission of the University," and "[w]ithout the faculty, the University would be unable to prepare its students intellectually, professionally, aesthetically,

spiritually, or ethically." JA768 [Union Ex. 9 at 10]. The Board has no right, constitutionally, to reject that view.[3]

C. The Board's Assurances that *Pacific Lutheran* Avoids Serious First Amendment Problems Are Unpersuasive.

The Board's repeated assurances to this Court that the *Pacific Lutheran* test does not give rise to religious entanglement blink at reality.

For example, the Board insists that *Pacific Lutheran* does not require it to "troll through" a university's beliefs and "make determinations about its religious mission," because, it claims, under *Pacific Lutheran* the Board must accept a university's own representations "at face value." NLRB Br. 33, 35. But that ignores that the Board is in fact substituting its own subjective view about what constitutes a sufficiently "specific religious function" for the University's view of the role played by its faculty. And, if *Pacific Lutheran* truly involved only a "face

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[3] The Board's carve-out of the Theology Department at Duquesne illustrates the illogic of its approach. While those that teach Catholic theology have an obligation to do so in accordance with Catholic theology, the Theology Department covers other topics, too. *See* Duquesne Univ., 2010-11 Undergraduate Catalog, at 158-160, *available at* https://duq.edu/assets/Documents/registrar/_pdf/UG_Catalog_Archives/ug-catalog-10-11.pdf ("2010-11 Catalog"); *see also* Er. Ex. 65 (Flash Drive Containing Course Catalogs). Duquesne encourages professors who teach biology, ethics or philosophy to connect faith and reason to the same extent as a professor who teaches "The Common Good" in the Theology Department. *See* 2010-11 Catalog. Yet the Board would exempt the professor who teaches "The Common Good" from its jurisdiction, but not the others.

value," unobtrusive inquiry, it is difficult to understand why the representation hearing in this case required nearly three days and 568 pages of testimony. *See* Duquesne Br. 39-40 (highlighting some of the questioning permitted at the hearing). The Board defends the intrusive questioning permitted by the hearing officer as "reasonable" because she cut off some questions while allowing others. *Id.* at 33-36. But this line-drawing is precisely what *Catholic Bishop* prohibits and the *Great Falls* test avoids.

Duquesne's concern that it will be pressured to bargain over mandatory subjects that implicate matters of religious principle was shared by then-Judge Breyer, who observed in *Bayamon* that for universities, the mandatory subjects of bargaining include the "whole of school life." 793 F.2d at 402. The Board blithely responds that the obligation to bargain does not include an obligation to agree and that economic pressures are just part and parcel of the NLRA. NLRB Br. 37, 39. What the Board fails to acknowledge, however, is that some religious principles are non-negotiable and may result in unfair labor practice charges for refusal to bargain. And when the economic pressures inherent in collective bargaining under the NLRA encroach upon First Amendment rights, "the statute must yield." *Ampersand Publ'g, LLC v. NLRB*, 702 F.3d 51, 56-57 (D.C. Cir. 2012) (criticizing Board for "dismiss[ing] out of hand" serious First Amendment issues raised by broad mandatory subjects of bargaining involving newspaper publisher).

Relying on a footnote in *Pacific Lutheran* that is ambiguous at best, the Board further represents that "it will decline jurisdiction over a[ny] dispute that 'require[s] or permit[s] [it] to decide any issues of religious doctrine.'" NLRB Br. 38 (quoting *Pacific Lutheran*, 361 NLRB at 1413 n.19). The Board goes on to argue that "if Duquesne represents that a bargaining topic is a matter of religious principle, the Board will not question that assertion." *Id*. This is a telling admission, and demonstrates that the Board should not be regulating the relationship between a religiously-affiliated university and its faculty at all, because of the great likelihood that issues will arise that the Board cannot address because of First Amendment concerns. Moreover, despite the Board's representation, it is hard to imagine that the University would not be challenged if it refused to bargain about numerous topics that usually arise in collective bargaining, from hiring criteria (including rehiring adjuncts who normally are hired on a semester-by-semester basis), to teacher evaluation, discipline and termination, that intersect with its religious mission. The same is true for unilateral changes in policies affecting adjunct faculty.[4]

[4] Relying on *Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550, 559-61 (D.C. Cir. 1980), the Union argues (at 34) that Duquesne's religious mission and how its faculty should carry out that mission "are matters of management prerogative" that are not negotiable under the NLRA. But that is just an assertion that the Board will on an "ad hoc" basis attempt to control its "efforts to examine religious matters." *Bayamon*, 793 F.2d at 402. Whatever purchase

The Board makes another concession. It represents that "if Duquesne wishes to modify adjuncts' terms and conditions of employment so as to impose religious-based requirements, such changes may alter the Board's analysis regarding how Duquesne holds out those adjuncts." NLRB Br. 38. This representation is even more problematic. The prospect of future litigation about whether Duquesne later will meet the Board's *Pacific Lutheran* test if it makes unidentified unilateral changes in terms and conditions of adjuncts' employment creates nothing but uncertainty for religiously-affiliated universities, and the promise of continuing Board intrusion.

The Board's assurances with respect to unfair labor practice charges involving adverse employment actions (NLRB Br. 39-42) are equally unclear. The Board promises it would "not decide any religious-based issue" in such cases, *id.* at 40, but what it appears to give with one hand, it takes away with the other. The Board states that it would decline jurisdiction if Duquesne dismissed an adjunct for hostility to the University's religious beliefs, but *only* if Duquesne's "public representations indicate that adjuncts, 'as a term and condition of employment,' were expected to comply with, or not contravene, those beliefs." *Id.* The Board then goes on to assert (incorrectly) that Duquesne has made no such public

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such an ad hoc approach might have in other contexts, it is "to tread the path that *Catholic Bishop* forecloses" here. *Id.*

representations. *Id.* at 40 n.8. As a result, the Board's promise of non-intrusion is entitled to little weight, at least as to Duquesne.

The Board also seems to be reserving to itself the right to determine whether Duquesne's decision to terminate an adjunct for hostility to its religious mission is driven by legitimate religious reasons or by anti-union animus. *Id.* at 41. If so, this would be entirely improper.[5] As *Catholic Bishop* explained in forcefully rejecting a similar argument, resolution of charges of anti-union animus by the Board will in many instances

> necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

[5] The Board cites *Ohio Civil Rights Commission v. Dayton Christian Schools Inc.*, 477 U.S. 619 (1986), to support its contention that a Board investigation into "'whether the ascribed religious-based reason was in fact the reason for the discharge,'" by itself, would not violate any First Amendment rights. NLRB Br. 41. But that just echoes an argument the Board made and the Supreme Court rejected in *Catholic Bishop*: "The Board argues that it can avoid excessive entanglement since it will resolve only . . . whether an anti-union animus motivated an employer's action. But at this stage . . . we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue." 440 U.S. at 502. "Rather," the Court explained, "we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed." *Id.*

440 U.S. at 502. It is that risk that forecloses Board jurisdiction over the faculty of religiously-affiliated universities such as Duquesne.

III. THE BOARD FAILED TO FOLLOW ITS OWN PRECEDENT IN APPLYING *PACIFIC LUTHERAN*.

Even if the Court concludes that the Board's *Pacific Lutheran* test controls, its application of that test to Duquesne should be set aside.

For starters, the Board has no serious response to Duquesne's argument (Br. 49-50) that its assertion of jurisdiction in this case is inconsistent with the Board's recent decision in *Carroll College*, No. 19-RC-165133 (N.L.R.B. Jan. 19, 2016). It is "axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent." *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1443–44 (D.C. Cir. 1997) (internal quotation marks omitted).

Both Duquesne and Carroll College prohibit the petitioned-for faculty from denigrating the institution's religious mission, and yet the Board asserted jurisdiction over Duquesne while declining jurisdiction over Carroll College. The Board argues that although Duquesne's *Faculty Handbook* provides for termination of tenured faculty for serious misconduct, which is defined to include "failure to observe the principles" of Duquesne's mission statement, adjuncts are not expressly included in that provision. NLRB Br. 49 n.12. But it is absurd for the Board to suggest that adjunct faculty would conclude that they are free to

express hostility to Duquesne's religious mission without consequence, when tenured faculty members can be terminated for the same conduct. And, as discussed above, *supra* 13-18, the University's definition of academic freedom—which the Board and the Union agree applies to adjuncts, *e.g.*, NLRB Br. 49–50, Union Br. 25—includes a limitation that faculty must "respect the religious and ecumenical orientation of the University." JA770 [Union Ex. 9 at 12]. The Board's brief also ignores the fact that its own Regional Director expressly found in this case that adjunct faculty may not be openly "hostile" to Duquesne's religious mission. JA74, 77 [Regional Director's Decision at 7, 10]. There is simply no meaningful way to distinguish this case from the recent decision in *Carroll College*.

The Board also argues that because it denied review of the Regional Director's decision in *Carroll College* in an unpublished order, the order has "no precedential value" under the Board's internal rules. NLRB Br. 49 n.12. But the Board did *not* simply deny a request for review in *Carroll College*. On the contrary, it explicitly "agree[d] that the Regional Director properly declined jurisdiction under *Pacific Lutheran.*" Order at 1 n.1, *Carroll Coll.*, No.19-RC-165133 (N.L.R.B. May 25, 2016). And the Board's internal rules about precedent do not absolve it from the obligation to treat like parties alike and to explain why when it fails to do so. *See Burlington N. & Santa Fe Ry. Co. v. Surface Transp.*

Bd., 403 F.3d 771, 776–77 (D.C. Cir. 2005) ("An agency must provide an adequate explanation to justify treating similarly situated parties differently."); *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("[W]here, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.").

The Board's order also cannot stand because it disregards substantial record evidence, including Duquesne's public documents, demonstrating that all faculty are subject to the University's religious orientation and mission statement. As this case proves, the Board's assurance that it will only look at how a University holds its faculty out to the public is a fiction; the Board in fact applies a subjective test to determine whether the University's expectation of its faculty is "sufficiently religious." *See* Duquesne Br. 47-51.

IV. DUQUESNE'S CONTENTION THAT THE BOARD'S ORDER VIOLATES RFRA IS PROPERLY BEFORE THE COURT.

As explained in Duquesne's opening brief (at 51-55), the Board's Order also violates RFRA because the duty to bargain collectively with the Union substantially burdens Duquesne's ability to manage relations with its adjunct faculty consistent with its religious mission, and because the Board cannot demonstrate a compelling interest in asserting jurisdiction over the University when so many other institutions are excepted from the NLRA's reach. The Board does not contend otherwise, but instead argues that Duquesne's RFRA argument is

barred by the Board's "non-relitigation" rule. NLRB Br. 51-57. The Board is wrong, for at least two reasons.

First, the Board's rule does not apply here for the simple reason that RFRA is not a "representation" issue. The Board's rule prohibits relitigation, in a related subsequent unfair labor practice proceeding, of "representation issues that were or could have been litigated in the prior representation proceeding." *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1151 (D.C. Cir. 2000) (quoting *Thomas-Davis Med. Ctrs., P.C. v. NLRB*, 157 F.3d 909, 912 (D.C. Cir. 1998)); *accord, e.g., Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008). But RFRA has nothing to do with the scope of the bargaining unit, employees' eligibility to vote, or any other labor policy or standard under the NLRA. *See McDonnell Douglas Corp. v. NLRB*, 59 F.3d 230, 234 (D.C. Cir. 1995) ("[r]epresentation issues involve the application of basic statutory policy and standards, and are matters for decision *exclusively* by the Board") (emphasis in original) (quoting *McDonnell Douglas Corp.*, 312 N.L.R.B. 373, 375 n.5 (1993)). Rather, the question in this case is whether RFRA exempts Duquesne's relationship with its adjunct faculty from coverage under the NLRA altogether. In that regard, the claim is similar to a *Catholic Bishop* claim, which this Court has held can be decided on a petition for review even if the issue was not raised before the Board at all. *Carroll Coll.*, 558 F.3d at 574.

Second, the rule does not apply here because Duquesne did raise RFRA in both the representation proceeding and the unfair labor practice proceeding. At both stages, the University specifically argued that application of *Pacific Lutheran* would substantially burden its free exercise rights. *See* JA45-46 [Post Hearing Br. 30 n.13], JA112-13 [Petition for Board Review 28-29 n.10]; JA168-70 [Opp. to Summary Judgment 14-16]. The Union points out that Duquesne made a somewhat different RFRA argument in the representation proceeding, focusing on *Pacific Lutheran's* impact on represented faculty members. (Union Br. 35 n.4.) But there is no dispute that it did raise the RFRA issue in the representation proceeding, and tailoring the argument to the specific phase of the case is not tantamount to waiver.

Duquesne's RFRA claim is therefore properly before the Court and provides an additional ground for setting aside the Board's Order.

CONCLUSION

For the foregoing reasons, and those set forth in Duquesne's opening brief, this Court should grant Duquesne's petition for review, deny the Board's cross-application for enforcement of the Order, and vacate the Board's Order.

Respectfully submitted,

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I certify that on November 6, 2018, the foregoing Final Reply Brief For Petitioner/Cross-Respondent was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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